

ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20054

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In the Matter of )  
)  
)

Amendment of Section 73.202(b) )  
Table of Allotments )  
FM Broadcast Stations )  
Graham, TX )

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MM Docket No. 99-233  
RM-9662

To: Kathleen Scheuerle  
Allocations Branch

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FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20054

RESPONSE OF NTGR TO

PETITIONER'S REQUEST TO DISMISS COUNTERPROPOSAL

On August 31, 1999, Petitioner Graham Tollway Broadcasting Company ("GTBC") filed a "Reply to Counterproposal" that contains a Request to Dismiss the Counterproposal, which was filed by North Texas Radio Group, L.P. ("NTRG") on August 16, 1999. See Reply at 3. This Response is filed on behalf of NTRG in opposition to the Request. <sup>1/</sup>

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<sup>1/</sup> In the alternative, NTRG respectfully submits that this Response should be received and considered by the FCC as a "Supplement" to its Reply. There is good cause for its receipt. The FCC often receives and considers supplemental material from parties when, in the interest of a complete record, to do otherwise would be an abuse of discretion. See 47 USC 154(j) (FCC is charged by Congress with conducting its proceedings so as to serve the ends of justice). In this case, GTBC urged -- in its "Reply" -- that NTRG's Counterproposal should be "dismissed." It would be manifestly unfair not to afford NTRG one opportunity to respond to the arguments -- however unmeritorious -- on which GTBC's dismissal request is based.

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Understandably faced with a high hurdle of overcoming the manifest public interest inherent in NTRG's Counterproposal,<sup>2/</sup> GTBC nevertheless displays near reckless disregard for the operative facts and FCC policy in asserting that NTRG's Counterproposal is "procedurally defective" (Reply at 2) and "should be dismissed" (Reply at 3).<sup>3/</sup>

With apologies to the FCC staff for stating the obvious, it is sufficient here to note that the attached Engineering Statement adequately dispatches two of the more unique assertions

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<sup>2/</sup> While Petitioner had requested the allotment of FM channel 253A to Graham, TX, as a "second FM [third aural] service" (see Petition for Rule Making at 1), the **Counterproposal** seeks to upgrade FM station KBOC (FM) at Bridgeport, TX from Class A to a full Class C and to make several related changes that will result in numerous public interest benefits, including the provision of new **"first local aural service"** to several communities in Texas and in Oklahoma.

<sup>3/</sup> GTBC misstates the facts and FCC policy. For example, GTBC argues that the Counterproposal is "defective" because, inter alia, NTRG presented "no information on [sic] the 1990 US Census to indicate that Price, Texas is a town, city or CDP." See Reply at 2. The FCC's FM allocations decisions never have held that a Petitioner must present Census data in order to establish that a town qualifies as a "community" for FM allotment purposes. See, e.g., Dunnigan, CA, Report & Order, released October 24, 1995. Here, NTRG presented substantial evidence that Price, TX is a community deserving and needing a first local aural service. See Counterproposal at 7-8 (and see note 11).

Likewise, the Counterproposal is not "defective" and subject to "dismissal" [see GTBC Reply at 2] simply because it proposes to "remove the only FM service" in Stephenville and Bonham, TX in order to propose new first local service at Ranger, TX and Fort Towson, OK. The FCC often has awarded such new, first local service even though a community would be left with only a local AM transmission service. See Pauls Valley and Healdton, OK, Report & Order, released March 12, 1999.

Finally, it is absurd for GTBC to assert [see GTBC Reply at 3] a "real party in interest" issue here. NTRG has disclosed the dates of and parties to three Facility Change agreements between NTRG and the licensees of KJMZ (FM), KCUB (FM) and KACO (FM). See Counterproposal at notes 4, 6 and 12.

relied upon by GTBC in its request that the Counterproposal be dismissed. See Appendix A.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert Thompson", with a stylized flourish at the end.

Robert Lewis Thompson  
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Counsel for North Texas  
Radio Group, L.P.

September 17, 1999

**Certificate of Service**

I, Robert Thompson, do certify that I served a copy of the foregoing Response on the following counsel of record:

Audrey Rasmussen, Esq.  
1666 K Street, NW #500  
Washington, DC 20006

  
Robert Thompson

September 17, 1999

**APPENDIX A**

North Texas Radio Group, L.P.  
5946 Club Oaks Drive  
Dallas, TX 75248

**Response to Request to Dismiss**  
MM Docket 99-233  
September 1999

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STATE OF ILLINOIS            )  
                                  )       SS:  
COUNTY OF PEORIA            )

F. W. Hannel, after being duly sworn upon oath,  
deposes and states:

He is a registered Professional Engineer, by  
examination, in the State of Illinois;

He is a graduate Electrical Engineer, holding  
Bachelor of Science and Master of Science degrees, both in  
Electrical Engineering;

His qualifications are a matter of public record  
and have been accepted in prior filings and appearances  
requiring scrutiny of his professional qualifications;

The attached Engineering Report was prepared by  
him personally or under his supervision and direction and;

The facts stated herein are true, correct, and  
complete to the best of his knowledge and belief.



September 14, 1999

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**Response to Request to Dismiss**  
MM Docket 99-233  
September 1999

**ENGINEERING STATEMENT**

This firm has been retained by North Texas Radio Group, L.P., ("NTRG"), licensee of Radio Station KBOC(FM), Bridgeport, Texas, to prepare this engineering statement in support of its response to a Reply to Counterproposal filed by Graham Tollway Broadcasting Company, ("GTBC"), on August 31, 1999, which requested that the Counterproposal be dismissed.

**Summary**

The Commission, by Public Notice dated June 25, 1999, has proposed the allotment of FM Channel 253A to the community of Graham, Texas as that community's third aural service<sup>1</sup>. On August 16, 1999, NTRG filed a Counterproposal seeking, among other things, the upgrade of its station KBOC(FM), Bridgeport, Texas, from FM Channel 252A to FM Channel 252C. On or about August 31, 1999, GTBC filed a reply that also contained a request for dismissal of the Counterproposal. As support for the dismissal request, GTBC attached a laundry list of alleged deficiencies.<sup>2</sup>

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<sup>1</sup> Graham, Texas is served by Radio Station KSWA(AM) operating full time on 1330 kHz, and by Radio Station KWKQ(FM) operating on FM Channel 296C3. Both of these facilities are licensed to Graham, Texas.

<sup>2</sup> Included among the laundry list of alleged deficiencies is a claim that NTRG must submit population counts, including reception services, to support the upgrade of FM Channel 252A to FM Channel 252C at Bridgeport, Texas. NTRG's proposed upgrade is a request for an on channel upgrade for an existing assignment at Bridgeport. GTBC claims that, for some unspecified reason, NTRG must count reception and transmission services to justify its right to the highest class channel that can be assigned to it. Such a claim is simply absurd.

## DISCUSSION

As an initial matter, it should be noted that the technical statement attached to the Reply to Counterproposal filed by GTBC is noteworthy in what it does not say, not necessarily in what it does say. No claim is made that any of the Counterproposal's allotment sites fail to comply with the Commission's Rules; no claim is made that any of the communities involved are not deserving of a first local service and, finally, no claim is made that the GTBC proposal better serves the public interest. Instead, GTBC tries in vain to "create" deficiencies in the NTRG proposal.

There are essentially only two material items that deserve to be addressed here: a) the claim that NTRG failed to submit FAA, zoning, city grade coverage maps, as well as other material relating to the allotment sites, and b) the claim that the NTRG proposal fails to comply with the provisions of Section 73.207 of the Commission's Rules.<sup>3</sup>

Contrary to the claim of GTBC, all of the allotment sites contained in the Counterproposal comply fully with the Commission's Rules<sup>4</sup>. In each and every case a statement is made in the technical narrative to that effect, the distance and bearing from the community to the allotment site is given and a showing concerning city grade coverage is provided.<sup>5</sup> By definition, a proposed allotment site is one that fully complies with the Commission's Rules, and when a professional refers to a given set of coordinates as an allotment site, that site, by definition, complies with the Commission's requirements. Otherwise, it could not be called an allotment site. With the development of computer software<sup>6</sup> in the

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<sup>3</sup> The pleading of GTBC erroneously refers to 73.208, yet this cannot be correct. Section 73.207 deals with mileage separation requirements. Section 73.208 deals with distance computation methods.

<sup>4</sup> Interestingly, if one accepts the GTBC argument, then the original proposal of GTBC must be dismissed. Their original filing, upon which the Commission issued its Notice of Proposed Rulemaking, did not contain the very data GTBC now claims the Counterproposal was lacking.

<sup>5</sup> Where there is any question regarding the allotment site, additional data is given, as in the case of the Price, Texas, proposed allotment site where the actual terrain calculations were provided.

<sup>6</sup> Every professional engineer in this industry, as well as the Commission, has computerized mapping software and utilizes that software extensively. For those that do not, the US Census Bureau maintains an internet site where maps are available, thereby all but eliminating the need for hard copy map submissions. This data was not available 7 years ago.

last several years, one only has to key in the co-ordinates to determine if the allotment site is in the middle of a lake or suffers some other defect<sup>7</sup>. Significantly, GTBC does not point to any defect in any of the proposed allotment sites.

As a final consideration, GTBC claims that the proposal of NTRG fails to meet the mileage separation requirements of Section 73.207 of the Commission's Rules. Specifically, GTBC states (*Reply at 2*):<sup>8</sup>

"In addition, GTBC submits that the Bridgeport, Texas site does not meet the FCC spacing requirements pursuant to Section 73.208 of the Commission's Rules and Regulations."

The engineering narrative acknowledges that the Counterproposal complies with all mileage separation requirements with the exception of the spacing to a Construction Permit, File Number BPH-990527ID, for Radio Station KRYL(FM), Gatesville, Texas. In the Counterproposal, this Section 73.215 Construction Permit and its related short spacing was addressed in detail; however, claims, mistakenly, that this Construction Permit requires protection as a fully spaced facility.

As authority for its claim, GTBC refers to MM Docket 92-159, released July 13, 1993. NTRG disagrees. The proceeding that resulted in the adoption of the *Report and Order* in MM Docket 92-159 was an outgrowth of proceedings instituted for the sole purpose of processing "one-step" upgrades. In that proceeding, the Commission required that all allotment sites be fully spaced and the use of Section 73.215 was not allowed for allotment purposes for one-step upgrades.

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<sup>7</sup> As an example of this evolution, the Commission, on July 15, 1999, eliminated the site map requirement entirely on all FCC 301 Construction Permit applications, including one-step upgrades. Surely, GTBC, in good faith, cannot claim a higher submission standard for a theoretical point that is used for allotment purposes in the Counterproposal.

<sup>8</sup> See note 3, supra.

The Commission's mileage separation requirements have been strictly enforced in one-step upgrade proceedings; however, in a full rulemaking proceeding that is not the case. Section 73.207(a) provides:

(a) Except for assignments made pursuant to §73.213 or §73.215, FM allotments and assignments must be separated from other allotments and assignments on the same channel (co-channel) and five pairs of adjacent channels by not less than the minimum distances specified in paragraphs (b) and (c) of this section. The Commission will not accept petitions to amend the Table of Allotments unless the reference points meet all of the minimum distance separation requirements of this section. The Commission will not accept applications for new stations, or applications to change the channel or location of existing assignments unless transmitter sites meet the minimum distance separation requirements of this section, or such applications conform to the requirements of §73.213 or §73.215. However, applications to modify the facilities of stations with short-spaced antenna locations authorized pursuant to prior waivers of the distance separation requirements may be accepted, provided that such applications propose to maintain or improve that particular spacing deficiency. Class D (secondary) assignments are subject only to the distance separation requirements contained in paragraph (b)(3) of this section. (See §73.512 for rules governing the channel and location of Class D (secondary) assignments.)

The first sentence of this section clearly states that "**EXCEPT** for assignments made pursuant to Section 73.213 or Section 73.215, **FM Allotments** and assignments must be ....", (emphasis added). It is obvious that this section provides different treatment for stations licensed under Section 73.215 in allotment proceedings. That is, in an allotment proceeding, a station assigned under the provisions of Section 73.215 of the Rules is provided protection in accordance with the contour protection provisions of the Rules, not the mileage separation requirements. This is sensible because to afford an existing 73.215 licensee the benefits of short spacing on one hand and then afford that same licensee protection under the minimum mileage separation requirements would not be consistent.

In the case of KRYL(FM), Gatesville, Texas the proposal of NTRG offers full protection under the mileage separation requirements to the allotment site for that facility. It offers full protection to the fully spaced licensed site under the mileage separation requirements of Section 73.207 of the Commission's Rules. Additionally, it provides full contour protection to the Construction Permit site that is being applied for under the provisions of Section 73.215.

The Commission has visited this situation on other occasions and has applied the above rationale accordingly. In Caldwell, Texas, the Commission accepted a counterproposal that was short spaced to the allotment site and a site that had been applied for in Nolanville, Texas<sup>9</sup>. The applicant in Nolanville accepted a license modification to specify that it was to be licensed under the provisions of Section 73.215, and the Commission then proceeded to assign FM Channel 297A to Caldwell, Texas. The applicant at Caldwell objected to the short spaced channel assignment and the Commission, in its Report and Order, released on July 5, 1995, in MM Docket 91-58, handled the 73.215 assignment and the short spaced situation in footnote 4 as follows:

4. In its comments, Hicks proposed a Channel 236C2 upgrade for Station KTSR in College Station and an accommodating Channel 297A substitution at Caldwell. In order to allot Channel 297A to Caldwell, Texas, Hicks proposed a site restriction on the Channel 297A allotment at Nolanville, Texas. At the time Val-Jo filed its Comments and Counterproposal, it was an applicant for the Channel 297A allotment at Nolanville. In addition to an argument concerning the technical feasibility of such a site restriction, Val-Jo suggested an alternate Channel 274A substitution for Caldwell. Subsequently, Val-Jo became the permittee of Station KLFX (now KKFF), Channel 297A, Nolanville (File No. BMPH-930416IB) using the equivalent protection criteria set forth in Section 73.215 of the Rules with respect to a Channel 297A allotment in Caldwell. On March 27, 1995, we granted the covering license application (File No. BLH-941117KC). As such, there is no longer any need for a site restriction on the Nolanville allotment, and the Nolanville allotment will not be considered further in this proceeding. Finally, we note that the

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<sup>9</sup> The original allotment and the original Construction Permit application were fully spaced.

construction permit had been assigned on July 20, 1994, to Sheldon Broadcasting, Ltd. (File No. BAPH-940503GN).

The Commission utilized the provisions of Section 73.215 to allow the assignment of FM Channel 297 at Caldwell, Texas where the proposed assignment was short spaced **to both the allotment site and the pending application site** at Nolanville. The applicant at Nolanville accepted a 73.215 modification of its facility **after the counterproposal had been filed** to allow the Channel 297 allotment at Caldwell.

In the Gatesville situation, no modifications of any license are being requested. The NTRG proposal fully protects the licensed and allotment site for FM Channel 252A at Gatesville. In addition, NTRG fully protects the Construction Permit site, File Number BPH-990527ID, a Section 73.215 assignment that was requested by the licensee of the Gatesville facility. NTRG does not request any license or allotment modifications whatsoever at Gatesville.

As is shown above, the Counterproposal filed in this proceeding by NTRG fully complies with all of the Commission's Rules. It fully protects all facilities under the Commission's Rules, and, when compared to the proposal to add a third aural service to Graham, Texas, the NTRG proposal clearly offers greater public interest benefits and is the superior proposal.